

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ZUNI SOLAR, LLC,	:
	: Civil Action No. 15-5860
Plaintiff,	:
	: ECF CASE
vs.	:
	: COMPLAINT
SWINERTON BUILDERS,	:
	:
Defendant.	:
	: -----X

Plaintiff Zuni Solar, LLC (“Zuni Solar”), by and through its counsel, Drinker Biddle & Reath LLP, complains against the Defendant Swinerton Builders (“Swinerton”), as follows:

NATURE OF THE ACTION

1. This is an action to recover monies due to Zuni Solar from Swinerton based on Swinerton’s breaches of the engineering, procurement and construction contracts it entered into with Zuni Solar for the construction of solar photovoltaic generating facilities in San Bernardino County, California.

THE PARTIES

2. Zuni Solar is a Delaware limited liability company with its principal place of business and nerve center in Juno Beach, Florida. Zuni Solar is an indirect, wholly owned subsidiary of NextEra Energy, Inc., a Florida corporation. Zuni Solar is in the business of owning and operating solar photovoltaic energy projects which generate clean, renewable solar energy.

3. On information and belief, Swinerton is a California corporation with its principal place of business and nerve center in the State of California. On information and belief, Swinerton is in the business of providing technical assistance, licensing, engineering,

procurement, construction management, construction, commissioning, start-up and testing services for construction projects, including, without limitation, solar energy projects.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the matter in controversy under 28 U.S.C. § 1332 (a) (1) and (2) (diversity of citizenship) as it is between citizens of different states, and the amount in controversy exceeds \$75,000, exclusive of costs and interest.

5. Venue is proper in this Court because pursuant to Article 17.2.1 of the contracts between Zuni Solar and Swinerton that form the basis of this action (discussed more fully below), Zuni Solar and Swinerton expressly agreed that any judicial proceeding arising out of or relating to the contracts shall be brought in this Court (“[T]he parties agree that venue for such litigation shall be the United States District Court for the Southern District of New York, or the Supreme Court of the State of New York sitting in New York County...”).

BACKGROUND FACTS

6. On or about June 20, 2014, Zuni Solar, as owner, and Swinerton, as contractor, entered into a Turnkey Engineering, Procurement and Construction Agreement for Solar Photovoltaic Generating Facility (the “Zuni North EPC Agreement”) pursuant to which Swinerton, agreed to, among other things, design, engineer, procure, construct, start up, and carry out testing for a solar photovoltaic generation facility with a nominal capacity of 1,512.8 kW (“Zuni North Project”), and to, among other things, manage, supervise, inspect and furnish all labor, equipment, contractor equipment, temporary structures, temporary utilities, products and services necessary to carry out and complete those services.

7. On or about June 20, 2014, Zuni Solar, as owner, and Swinerton, as contractor, also entered into a Turnkey Engineering, Procurement and Construction Agreement for Solar Photovoltaic Generating Facility (the “Zuni South EPC Agreement”) pursuant to which

Swinerton agreed to, among other things, design, engineer, procure, construct, start up, and carry out testing for a solar photovoltaic generation facility with a nominal capacity of 1,512.8 kW (“Zuni South Project”), and to, among other things, manage, supervise, inspect and furnish all labor, equipment, contractor equipment, temporary structures, temporary utilities, products and services necessary to carry out and complete those services.

8. Pursuant to the Zuni North EPC Agreement and the Zuni South EPC Agreement (collectively, “Zuni Agreements”), Swinerton agreed to, and guaranteed, the timely and proper completion of the work it contracted to do for the Zuni North Project and Zuni South Project (collectively, “Zuni Projects”) in strict accordance with the terms and conditions set forth in the Zuni Agreements.

9. Pursuant to the terms of the Zuni Agreements, Swinerton was required to satisfy all of the requirements for “Provisional Acceptance” for the Zuni Projects by December 31, 2014. Indeed, Article 11.1.1 of the Zuni Agreements states, in relevant part, “Contractor hereby guarantees that Provisional Acceptance will occur no later than the Guaranteed Provisional Acceptance Date [December 31, 2014]...”

10. To achieve Provisional Acceptance for the Zuni Projects, Swinerton was required to, among other things, establish that it had mechanically completed and successfully tested the Zuni Projects, obtained the approval of the energy off-taker for the initial synchronization of the Zuni Projects, and obtained and delivered to Zuni Solar all permits required for the Zuni Projects. Upon completion of all of the requirements for Provisional Acceptance, Swinerton was required to execute and deliver a Provisional Acceptance Certificate for each of the Zuni Projects to Zuni Solar.

11. Swinerton failed to achieve Provisional Acceptance for each of the Zuni Projects. Accordingly, Swinerton did not (because it could not) provide Zuni Solar with a Provisional

Acceptance Certificate for the Zuni Projects in compliance with Article 10.7.1.

12. Article 11.1.3 of the Zuni Agreements states, “If Contractor fails to achieve Provisional Acceptance within fifteen (15) Days after the Guaranteed Provisional Acceptance Date..., Contractor: (a) shall be considered in default, and this Agreement may, at Owner’s sole and exclusive discretion, be terminated in accordance with Article XV; and (b) shall continue to pay the Schedule Liquidated Damages described in Section 11.2 until the aggregate amount of Schedule Liquidated Damages payable hereunder in accordance with Section 11.5.3 shall be reached.” Because Swinerton failed to achieve Provisional Acceptance by January 15, 2015, Swinerton defaulted under the Zuni Agreements and remains liable for the Schedule Liquidated Damages.

13. Article 11.2.1 in each of the Zuni Agreements states, in relevant part, “If Contractor shall fail to achieve Provisional Acceptance for the Project by the Guaranteed Provisional Acceptance Date, it shall pay to Owner, as liquidated and agreed damages and not as a penalty, an amount (collectively, the ‘Schedule Liquidated Damages’) equal to \$683.87 for each Day (or portion thereof) that Provisional Acceptance is delayed beyond the Guaranteed Provisional Acceptance Date, commencing with the first Day following the Guaranteed Provisional Acceptance Date. If Contractor shall fail to achieve Provisional Acceptance for the Project by the PPA Cliff Date [January 15, 2015], the Schedule Liquidated Damages amount shall be increased by an additional one-time, lump-sum amount equal to \$1,996,896.00...”

14. Moreover, Article 15.1.1 of the Zuni Agreements provides that the following constitutes a Contractor Event of Default: “The failure of Contractor, subject to the [15 day] grace period provided in Section 11.1 to achieve Provisional Acceptance by the Guaranteed Provisional Acceptance Date.” In addition, Swinerton committed other “Contractor Events of Default,” including, without limitation: (a) Swinerton’s failure to pay liquidated damages (Art.

15.1.6); (b) Swinerton's failure to comply with applicable law (Art. 15.1.8(d)); and (c) Swinerton's breach of its representations and warranties in Article XIII (Art. 15.1.10).

15. Article 15.2.1. of the Zuni Agreements states, "Upon the occurrence of a Contractor Event of Default, Owner may, at its option, terminate this Agreement, by giving written notice thereof to Contractor, which termination shall be effective upon the giving of such notice by Owner."

16. On or about March 19, 2015, Zuni Solar notified Swinerton in writing that because Swinerton had failed to achieve Provisional Acceptance for the Zuni Projects within 15 days of the Guaranteed Provisional Acceptance Date of December 31, 2014, a Contractor Event of Default had occurred under both Zuni Agreements.

17. On or about May 27, 2015, Zuni Solar again notified Swinerton in writing that a Contractor Event of Default had occurred under both Zuni Agreements. Zuni Solar further demanded that Swinerton immediately remit the amount of \$2,246,508.00 to Zuni Solar pursuant to Article 11.2.1 of the Zuni North EPC Agreement and the amount of \$2,246,508.00 pursuant to Article 11.2.1 of the Zuni South EPC Agreement.

18. Article 18.20.2 of the Zuni Agreements states, "Contractor is familiar with this Agreement and understands: (a) the importance of completing its obligations under this Agreement on time and in accordance with the terms of this Agreement; and (b) that it is critical to the performance of its obligations under this Agreement that Owner have prompt and immediate access (in accordance with the requirements of this Agreement) to its contractual remedies under this Agreement in the event of a Contractor Event of Default." To date, despite Zuni Solar's written notices to Swinerton of its Contractor Event of Default, Swinerton has failed and refuses to pay to Zuni Solar the amounts due and owing under the Zuni Agreements resulting from Swinerton's defaults.

COUNT I

(Breach of Contract Against Defendant Swinerton)

19. Zuni Solar repeats each of the allegations contained in paragraphs 1 through 18 of the Complaint as if more fully stated herein.

20. Zuni Solar has performed all of its obligations under the Zuni Agreements required to be performed as of the date of this Complaint.

21. Swinerton materially breached the Zuni Agreements by committing Contractor Events of Default that include, but are not limited to, (a) Swinerton's failure to achieve Provisional Acceptance for the Zuni Projects within 15 days of the Guaranteed Provisional Acceptance Date of December 31, 2014 (Art. 15.1.1); (B) Swinerton's failure to pay liquidated damages (Art. 15.1.6); (c) Swinerton's failure to comply with applicable law (Art. 15.1.8(d)); and (d) Swinerton's breach of its representations and warranties in Article XIII (Art. 15.1.10).

22. Pursuant to Article 11.2.1 of the Zuni Agreements, Zuni Solar and Swinerton expressly agreed that if Swinerton failed to achieve Provisional Acceptance for the Zuni Projects by the Guaranteed Provisional Acceptance Date, Zuni Solar would be entitled to liquidated and agreed damages and not as a penalty, an amount equal to \$683.87 for each day that Provisional Acceptance of the Zuni North and Zuni South Projects were delayed. In addition, because Swinerton failed to achieve Provisional Acceptance for the Zuni North and Zuni South Projects by January 15, 2015 (the "PPA Cliff Date"), Zuni Solar is also entitled to liquidated and agreed damages of a \$1,996,896.00 lump sum under the Zuni North EPC Agreement and a \$1,996,896.00 lump sum under the Zuni South EPC Agreement. Accordingly, as of the filing of this Complaint, the sum of at least \$4,493,016.00 is due and owing to Zuni Solar.

DEMAND FOR RELIEF

WHEREFORE, Zuni Solar prays for judgment against Defendant Swinerton as follows:

1. For judgment against Defendant Swinerton in the amount of at least \$4,493,016.00, the precise amount of which will be proven at trial, plus interest;
2. For judgment against Defendant Swinerton for costs and fees (including, without limitation, attorney's fees), to the extent permitted by law, contract or otherwise, incurred in this action; and
3. For such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 27, 2015

DRINKER BIDDLE & REATH LLP

By: /s/ Clay J. Pierce
Clay J. Pierce

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